

1 THE HONORABLE BRIAN A. TSUCHIDA
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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**
9 **AT SEATTLE**

10 LVB-OGDEN MARKETING, LLC,

11 Plaintiff,

12 v.

13 DAVID S. BINGHAM, SHARON
14 BINGHAM, CHRISTOPHER BINGHAM,
15 KELLY BINGHAM, BINGO
16 INVESTMENTS, LLC, CCRB
ENTERPRISES, LLC, PARK PLACE
MOTORS, LTD., HYTECH POWER, INC.,
CICILIA ELALI (f/k/a CICILIA PARK),
HENRY DEAN, in his individual capacity and
as Trustee of the SHARON GRAHAM
BINGHAM 2007 TRUST, and BGH
HOLDINGS, LLC,

17 Defendants.
18

19 No. 2:18-CV-00243-TSZ
20

21 **LVB-OGDEN'S PETITION FOR**
22 **ATTORNEYS' FEES**

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LVB-OGDEN MARKETING'S PETITION FOR
ATTORNEYS' FEES

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1 **I. INTRODUCTION**

2 LVB brings the instant fee petition pursuant to three of Magistrate Judge Tsuchida's
 3 discovery orders, which granted attorneys' fees (collectively, the "Rule 37 Orders").¹ As the
 4 Court ordered on January 9th, LVB is entitled to recover its fees associated with the initial
 5 motion to compel pursuant to Rule 37(a)(5)(A). *See* ECF 211 at 15. The Court also ordered that
 6 LVB is entitled to recover its expenses associated with its subsequent motions seeking
 7 compliance with the Court's January 9th Order pursuant to Rule 37(b)(2)(C). *See* ECF 242 at 4;
 8 ECF 251 at 5. Accordingly, for the reasons set forth below, LVB respectfully requests \$43,375
 9 for its reasonable expenses incurred in bringing these three motions.

10 Additionally, LVB also seeks its fees associated with opposing Defendants' motion for
 11 reconsideration of the Court's January 31 Order (ECF No. 265), which was denied (ECF No.
 12 274), and for the time spent preparing this fee petition.² As many courts have recognized, "[i]f
 13 only the original motion to compel were compensable, the fee-shifting provision of Rule 37
 14 would have little effect." *Blair v. CBE Group, Inc.*, 2014 WL 4658731, at *2 (S.D. Cal. Sept.
 15 17, 2014) (collecting cases where fees have been awarded where a party moved to reconsider or
 16 filed a Rule 72(a) objection following a Rule 37 motion); *Brown v. Sullivan*, 916 F.2d 492, 497
 17 (9th Cir. 1990) (permitting recovery of attorneys' fees for time reasonably expended on a motion
 18 for attorney fees and costs).³ Accordingly, LVB also respectfully requests \$11,955 for fees
 19 related to these motions.

20 ¹ These are the orders (i) granting LVB's Motion to Compel Pursuant to Rule 37, (ECF 211 ("January 9
 21 Order")); (ii) granting LVB's Motion for Order Requiring Compliance with Docket Number 211, (ECF 242
 22 ("January 22 Order")); and (iii) granting LVB's Motion for *Ex Parte* Order to Compel Compliance and for
 23 Sanctions, (ECF 251 ("January 31 Order")).

24 ² References to "Defendants" in this Petition refer to David S. Bingham; Sharon Bingham; Christopher
 25 Bingham; Cherish Bingham; Kelly Bingham; Bingo Investments, LLC ("Bingo"); CCRB Enterprises, LLC
 26 ("CCRB"); SSKB Enterprises, LLC ("SSKB"); Park Place Motors, Ltd. ("Park Place"); Hytech Power, Inc.
 ("Hytech" or "HPI"); and Henry Dean, as Trustee for the Sharon Graham Bingham 2007 Trust ("the Trustee").

³ *See also Asia Pacific Agr. and Forestry Co. v. Sester Farms, Inc.*, 2013 WL 6157263, at *8 (D. Or. Nov. 22,
 2013) (awarding the prevailing party fees for preparing its fee petition resulting from a Rule 37 motion); *Aevoe
 Corp. v. AE Tech Co., Ltd.*, 2013 WL 5324787, at *7 (D. Nev. Sept. 20, 2014) (awarding feed under Rule 37 for

1 The factual and procedural background relevant to Defendants' contumacious discovery
 2 conduct in this action is detailed in the Court's Rule 37 Orders (ECF 211, 242, 251), and is only
 3 revisited here as needed to show the reasonableness of the fees sought by LVB.

4 **II. LEGAL STANDARD**

5 District courts have broad discretion to determine the reasonableness of fees. *Gates v.*
 6 *Deukmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). In determining "reasonableness," courts start
 7 with the "lodestar" method, multiplying (1) the number of hours reasonably expended on the
 8 litigation by (2) a reasonable hourly rate. *See City of Burlington v. Dague*, 505 U.S. 557, 559
 9 (1992); *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945 (9th Cir. 2007).

10 There is a "strong presumption" that the lodestar is reasonable, *id.* at 562, although the
 11 court may adjust the lodestar calculation based on the facts of the case. *Hensley v. Eckerhart*,
 12 461 U.S. 424, 429-30 (1983); *Welch*, 480 F.3d at 946. Courts consider the following factors
 13 when determining whether the lodestar should be adjusted due to the facts of the case: (1) the
 14 time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to
 15 perform the legal service properly; (4) the preclusion of employment by the attorney due to
 16 acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time
 17 limitations imposed by the client or the circumstances; (8) the amount involved and the results
 18 obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of
 19 the case; (11) the nature and length of the professional relationship with the client; and (12)
 20 awards in similar cases. *Hensley*, 461 U.S. at 429-30 n.3.

21 Reasonable hourly rates are "established by reference to the fees that private attorneys of
 22 an ability and reputation comparable to that of prevailing counsel charge their paying clients for
 23 legal work of similar complexity." *Welch*, 480 F.3d at 946; *see also Carson v. Billings Police*
 24 *Dept.*, 470 F.3d 889, 892 (9th Cir. 2006). "That a lawyer charges a particular hourly rate, and

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 26 "fees on fees" since "a party entitled to recover attorneys' fees should also recover the reasonable attorneys' fees necessarily incurred in obtaining a fee award.").

1 gets it, is evidence bearing on what the market rate is, because the lawyer and his clients are part
 2 of the market.” *Carson*, 470 F.3d at 892; *see also Baker v. Fireman’s Fund Ins. Co.*, 5 Wash.
 3 App. 2d 604, 623 (2018) (“When attorneys have an established rate for billing clients, that rate is
 4 likely a reasonable rate.”).

5 **III. ARGUMENT**

6 LVB requests \$55,330 in attorneys’ fees under the lodestar method, which is based on the
 7 reasonable time billed by LVB’s counsel from Kirkland & Ellis, LLP and the rates discussed
 8 below, which have been reduced to the commonly-accepted legal market rates for Seattle,
 9 Washington. *See* Faria Decl. ¶ 15. More specifically, LVB seeks \$688-746 per hour for the
 10 partners on the case, Tammy Tsoumas and Jonathan Faria; \$410-425 per hour for the senior
 11 associate, Heather Canner; and \$304-307 per hour for the junior associate, Leonora Cohen.⁴
 12

13 LVB’s requested rates are based on the average billing rates in Seattle of firms ranked in
 14 the top 50 by the American Lawyer (“AmLaw”), as reported by the *Valeo 2019 Attorney Hourly*
 15 *Rate Report* (“Valeo Report”). Courts and reputable news sources frequently rely on the Valeo
 16 Report to provide reliable fee information. *See e.g. Christopher E Banas, et al. v. Volcano*
 17 *Corp., et al.*, No. 12-CV-01535-WHO (N.D. Cal. Dec. 12, 2014) ECF No. 126 (relying on Valeo
 18 data to determine that the rates requested by the defendant “while high, are within the prevailing
 19 market rates” for the district).⁵ The Valeo Report analyzes and catalogs hourly billing rates for

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 21 ⁴ The rate at the low range is the hourly rate for time billed in 2018, and the rate at the high range is the hourly
 22 rate for time billed in 2019. Faria Decl. ¶ 14, Ex. 2.

23 ⁵ *See also ENI US Operating Co. Inc. v. Transocean Offshore Deepwater Drilling Inc.*, No. 4:13-CV-03354
 24 (S.D. Tex. May 16, 2018) ECF No. 225 (approving the defendant’s more than \$8 million dollar request for
 25 attorneys’ fees as reasonable where the defendant used the Valeo report to demonstrate that its counsel’s fees
 26 were consistent with the prevailing market); *Howmedica Osteonics Corp. v. Zimmer, Inc., et al.*, No. 05-897-
 WHW (D.N.J. Apr. 28, 2018) ECF No. 461 (same, where fees sought were more than \$13 million); Jennifer
 Smith, “On Safe: the \$1,150-Per Hour Lawyer,” *The Wall Street Journal*, April 10, 2013 (relying upon the Valeo
 Report to highlight going rates for partners and associates at the top 50 firms); Martha Nell, “Survey Shows
 Billable Rates for Associates Up 7.5% More than Twice as Much as for Partners,” *ABAJournal.com*, July 29,
 2012 (citing Valeo’s 2012 report).

1 top 50 AmLaw firms, as well as information about billing rates by geographic and practice area
 2 generally. Faria Decl. ¶ 14, Ex. 2. The Valeo Report describes its methodology as follows:
 3 Valeo gathers hourly rate and fee information at 1,500 law firms representing over 12,000 clients
 4 from (1) United States state and federal court public records; (2) publicly available government
 5 budgets where attorneys were hired to perform legal work for the public entity; and (3)
 6 registrations such as the Securities Exchange Commission. *Id.* at 44.

7 Kirkland & Ellis was the top law firm in the 2018 AmLaw rankings.⁶ For comparison,
 8 the Valeo Report provides the following average hourly rates for litigation attorneys at the top 10
 9 AmLaw firms:⁷

	2018	2019
Partner	\$1,118	\$1,210
Senior Associate	\$836	\$917
Associate	\$676	\$695

10 Faria Decl., Ex. 2 at 53. Since data is not compiled for average billable rates for the top 10
 11 AmLaw firms in the Seattle market—Kirkland’s nearest peers in experience, skill, and
 12 reputation—LVB instead seeks the lower rates of the average billable rates for firms in the
 13 AmLaw top 50, as reported by the Valeo Report:
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 22 ⁶ The Am Law 100, The American Lawyer, May 2018 at 77. In 2018, it also ranked number one in The
 23 Lawyer’s Global Litigation Top 50; was named Best Law Firm of the Year by The American Lawyer; and
 24 recognized as a litigation leader in BTI Consulting’s 2019 Litigation Outlook, which compiles feedback from
 25 more than 350 in-house counsel on more than 200 firms. *See* Ben Seal, Kirkland & Ellis Named Law Firm of the
Year at The American Lawyer Industry Awards, The American Lawyer, Dec. 5, 2018 at 1; *see also*, BTI
 Consulting Group, 2019 Litigation Outlook Report.

26 ⁷ The Valeo Report defines a Partner as a partner with 24 or less years of experience since their law school
 27 graduation, a Senior Associate as a lawyer with five or more years of experience, and an Associate as a lawyer
 28 with 4 or less years of experience. Ex. 2 at 44. Further, note that the 2019 rates are forecasted by Valeo. *Id.*

	2018	2019
Partner	\$688	\$746
Senior Associate	\$410	\$425
Associate	\$304	\$307

4 Faria Decl., Ex. 2 at 104. These discounted rates are clearly warranted here, as they are far less
 5 than the rates of attorneys at firms of equal or less experience, skill, and reputation than LVB's
 6 counsel. Faria Decl. ¶¶ 7-11 (detailing the professional and educational background of each
 7 member of LVB's legal team).⁸

8 Moreover, the amount of time LVB's counsel spent preparing and responding to the *four*
 9 related Rule 37 motions is reasonable, as set forth in the detailed time records attached as Exhibit
 10

11 1. Faria Decl. ¶ 4. The work was performed efficiently by experienced attorneys, including
 12 detailed analysis of discovery responses from eleven defendants. Faria Decl. ¶¶ 4-5.

13 Additionally, LVB is not seeking to recover a substantial amount of billed time in an effort to
 14 reduce the number of potential disputes and narrow the issues for the Court to decide, further
 15 bolstering the reasonableness of its request. For example, LVB is not seeking to recover *any*
 16 fees for the time support staff or local counsel spent on the motions at issue, nor is it seeking any
 17 reimbursement for any intra-office meetings regarding the motions. LVB is also absorbing *all* of
 18 its costs associated with these Motions, including filing fees and legal research costs.

19 Finally, the *Hensley* factors confirm the reasonableness of LVB's requested fees. Every
 20 relevant factor weighs in favor of upward departure from the lodestar amount:

21 • The first and fourth factors: Defendants' pattern of refusing to cooperate in discovery or
 22 comply with the Court's orders have resulted in excessive motion practice, significantly
 23 increasing the amount of time required by LVB's counsel to expend on this action, to the
 24 preclusion of other work. Faria Decl. ¶ 4, Ex. 1.

25 _____
 26 ⁸ The requested rates are also far less than the rates normally billed by LVB's counsel. Faria Decl. ¶ 14.

- The second and third factors: this case involves a declaratory judgment claim with seven components regarding the SGB 2007 Trust, and a claim under the UFTA that addresses over 260 different fraudulent transfers. ECF No. 82. These motions have required LVB to address and resolve 127 responses to interrogatories, and 130 responses to requests for production, from 11 different defendants, which included many different deficiencies, and required three different motions to resolve. *See* ECF No. 178.
- The fifth and ninth factors: LVB’s counsel’s customary rates are significantly above the amount requested here, in accordance with their experience, reputation, and ability.
- The sixth factor: Courts often recognize that where, as here, counsel’s fees are paid on a contingency basis, upward departure from counsel’s customary hourly rates is warranted due to the risk that they will receive no payment at all. *See Hensley*, 461 U.S. at 448.
- The eighth factor: The amount at issue is in the tens of millions of dollars, ECF No. 82 at ¶ 28, and the results achieved thus far exceed those achieved by any of the other creditors. Defendants have evaded.

The fact LVB would be justified seeking in an upward departure from the lodestar—yet does not do so—affirms the reasonableness of its fee request.

IV. CONCLUSION

For the foregoing reasons, LVB respectfully requests an Order from this Court awarding it \$55,330 in attorneys' fees.

DATED: February 27, 2019

s/ William R. Squires III

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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